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6 DAVID A. NUNN

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 *Plaintiff,*

12 vs.

13 DAVID A. NUNN

14 *Defendant.*

Case No. 6:20-po-00742-HBK

**REPLY TO GOVERNMENT'S OPPOSITION
TO MOTION TO DISMISS**

15
16 **INTRODUCTION**

17 In his April 26, 2021, motion to dismiss, Mr. Nunn argued that the underlying regulation
18 36 C.F.R. § 2.17(a) is arbitrary and capricious as applied to BASE jumping for two reasons.
19 First, that it was promulgated in violation of the Administrative Procedures Act 5 U.S.C. §
20 553(c) for failing to include a reasoned statement of basis and purpose, and second, because the
21 park's enforcement priorities, a matter of informal agency adjudication, were invalid under
22 *Citizens to Preserve Overton Park v Volpe*, 401 U.S. 402 (1971). The government opposed Mr.
23 Nunn's motion in their brief filed June 7, 2021. In that brief, the government did not address any
24 substantive issue raised by Mr. Nunn. Instead, the government sought to preclude Mr. Nunn's
25 argument by asking the court to impose procedural hurdles to the collateral attack on the
26 underlying regulation.
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1 The government argues that Mr. Nunn must exhaust administrative remedies, such as an
2 administrative appeal, before attacking the underlying regulation in district court. This is not the
3 case, as the rule the government relies on was set forth by the Ninth Circuit on appeal of a case
4 in which administrative exhaustion was a central component. In the instant case, no mechanism
5 for administrative exhaustion exists, and so the rule is inapposite. The government further
6 argues that Mr. Nunn is precluded from raising an affirmative defense attacking the regulation
7 because he failed to raise such a defense in a prior prosecution. The government misconstrues
8 this rule as well, and asks the court to impose a newly imagined form of procedural default by
9 which a prior defense strategy ties a defendant's hands in distinct future prosecutions. Even
10 reading the government's opposition generously, Mr. Nunn is not subject to any procedural
11 barriers to raising an affirmative defense attacking the underlying regulation and now moves the
12 court to grant his motion on the unopposed merits.

13 14 **I. ARGUMENT**

15 16 **A. Backlund Is Inapposite And Readily Distinguished From Mr. Nunn's Case**

17 The government's brief centers on *United States v. Backlund*, 689 F.3d 986 (2012). In
18 that case, two defendants were each charged separately with violating 36 C.F.R. § 261.10(b) for
19 residing at a mining site on forest service land absent authorization from the Forest Service. At
20 the outset, each of the two defendants filed an application for a permit to reside on the land
21 during mining operations, and each was denied by the Forest Service. One defendant, Backlund,
22 submitted a proposed plan of operation to the Forest Service, which reviewed the plan and wrote
23 a "Surface Use Determination" report. *Id.* at 992. The Forest Service determined that the
24 addition of structures supporting year round residency was not "incident and necessary" to
25 mining operations. *Id.* Backlund continued to reside at his mining operation, and was eventually
26 issued a notice of noncompliance by the forest service, requiring him to remove all structures and
27 equipment. Backlund appealed the notice of noncompliance administratively, and the notice was
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1 affirmed. Backlund then submitted a new plan of operations, which was met with the same
2 conclusion by the Forest Service as his original plan. *Id.* Backlund appealed the second plan to
3 the Forest Supervisor, and then again to the Deputy Regional Forester. The Deputy Regional
4 Forester affirmed, noting her decision as the final administrative decision. The Forest Service
5 then prosecuted Backlund for his continued residence on forest service land. Backlund pleaded
6 guilty, but preserved his right to appeal in the plea agreement. *Id.* at 994. The second defendant,
7 Everist, failed to make use of the administrative appeals avenues available to him, responding
8 only by letter that he disagreed with the findings of the Forest Service. Everist was convicted at
9 a bench trial and timely appealed. *Id.* at 995. The Ninth Circuit held that because defendant
10 Backlund had exhausted administrative remedies, and was within the statute of limitations, he
11 was entitled to present a defense attacking the underlying regulation. Defendant Everist was not,
12 having not expended his administrative remedies. *Id.* at 999.

13 The Ninth circuit acknowledged that two options exist to obtain judicial review of an
14 administrative regulation. First, by filing suit in district court under the Administrative
15 Procedures Act, and second, by challenging the agency's decision in a subsequent criminal
16 proceeding. The Ninth Circuit reasoned that permitting a collateral attack in a subsequent
17 criminal proceeding should not be an "end run" around the exhaustion requirement, and thus
18 reinforced the exhaustion requirement already set forth by statute in the Administrative
19 Procedures Act. 689 F.3d at 999; *See also*, 5 U.S.C. §§ 702, 704. The court in *Backlund* also
20 held that while the defendants *could* have sued in district court to avail himself of the opportunity
21 to attack the statute when their proposals were initially denied, they were not *required* to.
22 Because bringing suit is not the exclusive method by which to seek judicial review, defendants
23 were entitled to do so in mounting an affirmative defense in the subsequent criminal prosecution.
24 While *Backlund* presents a blueprint for how certain cases should proceed in district court, the
25 reasoning in *Backlund* does not apply here because Mr. Nunn's case proceeds from a different
26 posture.

1 In the instant case, there is no mechanism for administrative authorization to BASE jump,
2 and by extension, no avenue to exhaust administrative appeals. Yosemite National Park has
3 categorically banned BASE jumping for nearly 40 years, and only allowed a permitting system
4 for an extremely limited period of time in the early 1980s. Yosemite National Park's application
5 of 36 C.F.R. § 2.17(a) and its enforcement priorities do not allow for even regulated BASE
6 jumping. It is worth noting, as explicated in Mr. Nunn's opening brief, that Yosemite did allow
7 hang gliding, a similar activity. Hang gliding was explicitly recognized in the original statement
8 of basis and purpose, and the national park service had in place a permitting system which
9 regulated hang gliding in the park. That system was administered in a way similar to the system
10 described for mining operations in *Backlund* in that the National Park Service undertook to study
11 the impacts and eventually authorized the use. See ECF #18 at 17. The analogy to *Backlund* is
12 that if a hang glider applied for a permit through the established mechanism, and was denied,
13 then failed to appeal his denial, he could not then attack the regulation in district court if he were
14 later prosecuted. See *Backlund* at 999. However, if he had appealed, the hang glider would then
15 be in a position to attack the regulation, provided he raised the defense within the statute of
16 limitations. *Id.*

17 Mr. Nunn's case is different and readily distinguishable because the park has no
18 permitting system for BASE jumping. Because there is no way to apply for a permit, and hence
19 appeal a denial, the rule in *Backlund* does not apply. Mr. Nunn need not demonstrate that he
20 exhausted administrative remedies, because none were available, and is entitled to attack the
21 statute directly in district court upon criminal prosecution. See, *Backlund* at 1001 (remanding to
22 district court to allow collateral attack of the underlying regulation); see also, 5 U.S.C. § 704.

23 In the alternative, if this court were to apply the reasoning from *Backlund*, the outcome is
24 identical. Because there was no official avenue for administrative review, the court should
25 proceed from the agency's final decision. *Backlund* at 992. The finality of an agency decision
26 or action is an empirical test. *San Francisco Herring Association v. Department of the Interior*,
27 946 F.3d 564, 575 (2019). In that case, the plaintiffs properly pleaded that the National Park
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1 Service's continued enforcement of fishing restrictions within the Golden Gate National
2 Recreation Area, refusal to change its position despite pressure from fisherman's advocacy
3 groups, and citing of individual fisherman amounted to final agency action. 946 F.3d at 577. *See*
4 *also, U.S. Army Corps of Engineers v. Hawkes Co. Inc.* 136 S. Ct. 1807 (2016). In the instant
5 case, Yosemite National Park has enforced a total prohibition on BASE jumping for nearly 40
6 years. The National Park Service has refused to consider many protests to their policy, even
7 when the ongoing prohibition is linked to increased fatalities in the sport. *See* ECF # 18 at 4-7.
8 Rangers in Yosemite routinely target BASE jumpers with strict enforcement and confiscate their
9 equipment. Yosemite's intransigence with respect to BASE jumping is well documented. *Id.*
10 Because there is no mechanism to apply for permission to BASE jump, appeal a denial, or
11 petition the park to revise its enforcement policies, this court should consider the park's
12 enforcement actions as conclusive evidence of the final agency decision on whether to permit
13 BASE jumping. There can be no doubt that the enforcement actions of park rangers are neither
14 tentative nor interlocutory, and that they determine obligations from which consequences will
15 follow. *San Francisco Herring* at 579-579; *see also, Hawkes*, 136 S. Ct. 1807 (2016). Applying
16 *Backlund*, Mr. Nunn's challenge stems from the final agency action, the equivalent of an
17 exhausted administrative appeals process. As such, Mr. Nunn is entitled to judicial review.

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19 **B. Mr. Nunn Is Not Precluded From Attacking The Regulation By The Statute Of**
20 **Limitations.**

21 The government argues that a six year statute of limitations applies to Mr. Nunn's
22 affirmative defense because he was previously cited and convicted of the same offense in 1998.
23 This is a misreading of the rule in *United States v. Lowry*, 512 F.3d 1194 (9th Cir. 2008). In
24 *Lowry*, the defendant attempted to introduce evidence of a denied Indian land allotment claim
25 from 10 years prior as an affirmative defense to residing on forest service land illegally. The
26 district court held that because the defendant did not seek judicial review of the denial within the
27 statute of limitations, it could not be introduced as an affirmative defense. *Id.* at 1196. *Lowry* is
28 readily distinguishable from Mr. Nunn's case. *Lowry* is a single case that effectively spanned

1 more than 10 years without an intervening conviction to terminate the case. The initial denial of
2 Ms. Lowry's application for allotment in 1990 did not subject her to criminal prosecution. While
3 she did not prevail in her administrative claim, and the denial was effectively the final agency
4 action, there is no indication that she was ever charged with occupying forest service land until
5 2003. After over a decade in limbo, she tried to raise the denied allotment application as an
6 affirmative defense. Because she was not criminally prosecuted within the period of the statute
7 of limitations to challenge the final administrative denial in court, she could not raise the
8 affirmative defense in the criminal prosecution. Her only option was to sue in district court for
9 review of the denial before the statute of limitations ran, which she decided to forgo. *Lowry* at
10 1196.

11 The government proposes, without support, a rule in which a defendant's strategy in a
12 prior and distinct criminal proceeding creates a form of *res judicata* or procedural default in a
13 subsequent proceeding. Unlike *Lowry*, Mr. Nunn's case is not an uninterrupted line. He
14 previously pleaded guilty and decided to forgo not only affirmative defenses, but *all* defenses.
15 There is no authority which states that by forgoing a defense in a prior case, a defendant may not
16 raise it in a future case. Mr. Nunn is not being prosecuted for actions he took in 1998, he is
17 being prosecuted for actions alleged in 2020, and as such is well within the statute of limitations.

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19 **C. Mr. Nunn's Raises an "As-Applied" Challenge**

20 The government misconstrues Mr. Nunn's challenge to 36 C.F.R. 2.17(a) as a broad
21 attempt to overturn the regulation as a whole. Mr. Nunn challenges only the application of the
22 regulation to his alleged activities, that is, BASE jumping. Mr. Nunn's opening brief is clear in
23 the remedy sought. He asks only for his case to be dismissed in that the substance of the
24 regulation cannot be applied to BASE jumping. *See, Hoyer v. City of Oakland*, 653 F.3d 835, 857
25 (9th Cir. 2011) ("A paradigmatic as-applied attack, by contrast, challenges only one of the rules
26 in a statute, a subset of the statute's applications, or the application of the statute to a specific
27 factual circumstance, under the assumption that a court can separate valid from invalid subrules
28 or applications)(internal quotations omitted).

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CONCLUSION

For the reasons set forth above, Mr. Nunn respectfully moves the court to grant relief in dismissing the charge of violating 36 C.F.R. § 2.17(a) as the underlying regulation is arbitrary and capricious as applied to BASE jumping, and as Mr. Nunn faces no procedural barriers to relief.

Dated: June 21, 2021

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